

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

ALFREDO JUAREZ)	
Claimant)	
VS.)	
)	Docket No. 242,177
ROCK CONSTRUCTION COMPANY)	
Respondent)	
Uninsured)	
)	
AND)	
)	
SCHELLENBERG & WALDSCHMIDT)	
Respondent)	
AND)	
)	
ZURICH U.S.)	
Insurance Carrier)	

ORDER

Respondent, Schellenberg & Waldschmidt Construction, Inc., and its insurance carrier, Zurich U.S., requested Appeals Board review of Administrative Law Judge John D. Clark's December 22, 1999, preliminary hearing Order.

RECORD

The preliminary hearing record consists of the April 15, 1999, deposition of Alfredo Juarez; the May 6, 1999, deposition of Alvero Arevaro; the June 8, 1999, preliminary hearing transcript; the October 14, 1999, preliminary hearing transcript; the November 12, 1999, deposition of Alfredo Juarez; the November 12, 1999, deposition of Alvero Arevaro; the December 21, 1999, preliminary hearing transcript; the exhibits admitted into evidence at the depositions and preliminary hearings; and the pleadings and orders contained in the Division of Workers Compensation administrative file.

ISSUES

The Administrative Law Judge found claimant was injured while working for Rock Construction Company on December 15, 1998, and claimant had provided Rock Construction

Company with timely notice of the accident. The Administrative Law Judge ordered the payment of temporary total disability compensation, past medical expenses, and authorized Eustaquio O. Abay, II, M.D., as claimant's treating physician. He found Rock Construction Company was an uninsured subcontractor of Schellenberg & Waldschmidt, (S&W) on claimant's date of accident. All preliminary benefits were ordered paid by S&W as the principal contractor and its insurance carrier, Zurich U.S.¹

On appeal, S&W contends the claimant failed to prove he was injured while working for Rock Construction Company on December 15, 1998. S&W argues claimant's appropriate accident date is February 19, 1999, the last day claimant worked for Rock Construction Company. S&W argues the sheetrock work claimant was employed to perform for Rock Construction Company on his February 19, 1999, accident date was work Rock Construction Company had contracted to perform with the individual home owner and not S&W. S&W, therefore, contends it is not liable for payment of claimant's workers compensation benefits because on claimant's date of accident, February 19, 1999, claimant's employer, Rock Construction Company, was not working as a subcontractor for S&W.

In contrast, the claimant contends the preliminary hearing Order is supported by the preliminary hearing record and should be affirmed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the preliminary hearing record and considering the parties' briefs, the Appeals Board makes the following findings and conclusions:

The first preliminary hearing was held on June 8, 1999. In a preliminary hearing Order dated the same date, the Administrative Law Judge made the identical findings and conclusions, with one exception, as he did in the December 22, 1999, preliminary hearing Order that is subject of this appeal. In the June 8, 1999, Order, Premier Realty was found to be the principal contractor of claimant's employer, Rock Construction Company, instead of S&W. All benefits were, therefore, ordered paid by Premier Realty and its insurance carrier, Continental Western Insurance Company.

The June 8, 1999, preliminary hearing Order was timely appealed by Premier Realty to the Appeals Board. In an Order dated September 16, 1999, the Appeals Board affirmed the preliminary hearing Order except the Appeals Board found claimant's date of accident to be February 19, 1999, the last day claimant worked for Rock Construction Company, instead of the December 15, 1998, accident date found by the Administrative Law Judge.

Another preliminary hearing was held on October 14, 1999. This preliminary hearing was held to consider Premier Realty's Motion for Substitution of Parties. Premier Realty alleged that Rock Construction Company had never performed any work as a subcontractor on the behalf of Premier Realty. Premier Realty further argued that S&W had contracted with Rock Construction Company to perform certain sheetrock work on houses being constructed by S&W.

¹ See K.S.A. 1998 Supp. 44-503.

Premier Realty requested S&W to be substituted as the principal contractor in this case in place of Premier Realty.

S&W was present and represented at the October 14, 1999, preliminary hearing and agreed to be substituted as a principal contractor of Rock Construction Company. In an Order dated December 9, 1999, the Administrative Law Judge substituted S&W as a principal contractor and dismissed Premier Realty and its insurance carrier, Continental Western Insurance Company, from the proceedings.

Thereafter, claimant filed an Application for Preliminary Hearing requesting preliminary benefits to be paid by S&W as the principal contractor of claimant's uninsured employer, Rock Construction Company.

The preliminary hearing was held on December 21, 1999, and the preliminary hearing Order, that is the subject of this appeal, was entered by the Administrative Law Judge on December 22, 1999. The Administrative Law Judge found claimant was injured on December 15, 1998, while employed by Rock Construction Company. He also found claimant provided Rock Construction Company with timely notice of the accident. Additionally, the Administrative Law Judge found that on claimant's date of accident Rock Construction Company was performing work as a subcontractor for S&W, the principal contractor. All preliminary benefits were ordered paid by S&W and its insurance carrier, Zurich U.S.

The Appeals Board finds the material facts of this case that relate to the issues of whether claimant was injured while employed by Rock Construction Company on December 15, 1998, whether claimant provided the employer with timely notice of accident, and whether claimant was an employee or an independent contractor of Rock Construction Company, have not changed since the Appeals Board entered its September 16, 1999, Order. In that Order, the Appeals Board found claimant had suffered a work-related injury from a series of accidents ending on his last day worked, February 19, 1999. Claimant provided Rock Construction Company with timely notice of the accident. And, claimant was an employee of Rock Construction and not an independent contractor.

The Appeals Board concludes the findings and conclusions contained in its September 16, 1999, Order, as those findings and conclusions relate to the foregoing issues, do not need to be repeated in this Order. Therefore, the Appeals Board adopts those findings and conclusions as if specifically set forth herein.

The principal contractor is liable to pay workers compensation benefits to a subcontractor's injured employee where the payment of compensation is not secured, or is otherwise unavailable, or in effect.²

S&W contends it is not liable for the payment of preliminary benefits ordered to be provided the claimant in the December 22, 1999, preliminary hearing Order because on the claimant's accident date, February 19, 1999, Rock Construction Company was not performing

² See K.S.A. 1998 Supp. 44-503.

work as a subcontractor for S&W. The Appeals Board agrees with S&W. The Appeals Board finds the preliminary hearing record established through the testimony of the claimant and the testimony of Rock Construction Company's owner, Alvero Arevaro, that the sheetrock work claimant performed for Rock Construction Company from January 21, 1999, through claimant's last day worked, February 19, 1999, was work Rock Construction Company contracted with the individual owners of the houses and not with S&W. Claimant testified that his low back and right leg symptoms worsened while he was performing the sheetrock duties for Rock Construction Company until he was no longer able to perform those duties on or about February 19, 1999.

Based on the facts found above, claimant's appropriate date of accident is February 19, 1999, the last day claimant worked before he had to quit because of his injury.³ Accordingly, because claimant's employer, Rock Construction Company, was not working as a subcontractor for S&W on February 19, 1999, S&W is not liable, under K.S.A. 1998 Supp. 44-503, for workers compensation benefits owed the claimant.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that Administrative Law Judge John D. Clark's preliminary hearing Order dated December 22, 1999, should be, and it is hereby, modified and the preliminary benefits awarded are ordered paid by Alvero Arevaro d/b/a Rock Construction Company for an accidental injury that occurred on February 19, 1999. Schellenberg & Waldschmidt, and its insurance carrier, Zurich U.S., are not liable for payment of any preliminary benefits awarded.

IT IS SO ORDERED.

Dated this ____ day of April 2000.

BOARD MEMBER

c: Gerard C. Scott, Wichita, KS
Joseph Seiwert, Wichita, KS
Mark O. Sanderson, Kansas City, MO
John D. Clark, Administrative Law Judge
Philip S. Harness, Director

³ See Treaster v. Dillon Companies, Inc., 267 Kan. 610, 987 P.2d 325 (1999) and Berry v. Boeing Military Airplanes, 20 Kan. App. 2nd 220, 885 P.2d 1261 (1994).